IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 629

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, and H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL,

Petitioners

vs.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., a Corporation,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT CARY A. HARDEE, IN OPPOSITION

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U. S. STATUTES AND CIRCULARS OF THE CANAL ZONE

Title 12 U.S.C.:
Section 90 7-8-9
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August 21, 1916 10-11
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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR RESPONDENT CARY A. HARDEE, IN OPPOSITION

The petition for the allowance of a writ of certiorari in this case is presented on behalf of (a) the United States Shipping Board Merchant Fleet Corporation, (b) the Inland Waterways Corporation,

and (c) Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Agent and Chief of the Washington Office, Panama Canal, to review a decision of the Court of Appeals of the District of Columbia in favor of the Receiver of the Commercial National Bank of Washington, who sued to recover the proceeds of certain bonds pledged to secure payment of deposits in that bank of funds of the Merchant Fleet Corporation, Inland Waterways Corporation and the Panama Canal.

The petition is not accompanied by a supporting brief and in the reasons for granting the writ petitioner relies chiefly on the reasons assigned in another case, No. 628, in this Court. The case referred to deals solely with a petition filed on behalf of Harry H. Woodring and H. A. A. Smith, and is confined to the right of recovery of the proceeds of bonds pledged to secure repayment of deposits made by the Panama Canal in the District National Bank of Washington.

There is a substantial difference in the principles upon which respondent bases his right to recover in the cases in which the Merchant Fleet Corporation and the Inland Waterways Corporation are sued, and the case against Harry H. Woodring and H. A. A. Smith. The difference readily appears from the examination of the opinion of the court below (R. 106-122, inc.) which deals exhaustively with each case. The frame of the petition in this case proceeds on the assumption that there is no substantial difference in the cases of the Fleet Corporation, the Waterways Corporation, and the Panama Canal.

We shall point out subsequently the differences between the status of the United States Merchant Fleet Corporation and the Inland Waterways Corporation from that occupied by the two petitioners acting on behalf of the Panama Canal.

Opinions below and Jurisdiction of the Court

The statements set forth on page 2 of the petition for certiorari of the opinions below and of the statute under which the jurisdiction of this court is invoked are correct.

STATEMENT

The Statement of Facts found in the petition on pages 3, 4, 5, 6 and 7 correctly sets forth the details in connection with the making of the deposits, the pledging of assets of the bank to secure the deposits, the subsequent action of the two corporations in selling the bonds pledged with them, the action of the General Purchasing officer of the Panama Canal in taking over the bonds pledged to secure the Panama Canal deposit, as well as the bringing of the suit in the District Court and the decree there entered and its affirmation by the Court of Appeals for the District of Columbia.

We shall have occasion, however, in our discussion of the questions presented by the petition to supplement this recital by additional facts relevant to the questions at issue.

QUESTIONS PRESENTED

Petitioners urge only two questions of law as a basis for granting certiorari (see page 3 of petition),

though in a footnote it is stated that a third question will be submitted in the event that certiorari is granted. The two questions set forth in the petition are:

(1) Whether the pledges to the various petitioners were legal, and

(2) Whether the United States is an indispensable party defendant.

ARGUMENT

I

No Novel Question is Raised by the Petition for Writ of Certiorari nor Has It Been Shown that the Decision of the Court Below Is in Conflict with Any Decision of This Court or of Any Circuit Court.

Before entering upon our argument on the merits as to these two questions, attention of the Court is invited to the fact that so far as the Merchant Fleet Corporation is concerned, this petition is a second attempt to have this court review these identical questions. In *O'Connor* v. *Rhodes*, 296 U. S. 568 the Merchant Fleet Corporation sought a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia, in which that Court had held that the pledge of bonds by the Commercial National Bank to secure the deposits of the Merchant Fleet Corporation was illegal and void, and that suit could be brought for the recovery of the proceeds from the sale of such bonds without the United States being a necessary party. This ruling by the Court of Appeals was upon the identical facts here presented. The exact argument

now made was then made, and, this Court denied certiorari.

We shall have occasion to show that the position of the Inland Waterways Corporation is identical with that of the Fleet Corporation, and there is obviously no more reason for granting certiorari to the Inland Waterways Corporation than to the Fleet Corporation.

The position of H. H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Agent and Chief of the Washington Office, Panama Canal, in connection with the pledge to secure deposits of the Panama Canal funds differs from that of the corporate petitioners in that it involves consideration of certain acts and regulations of the Canal Zone which, of course, have no relationship to the other petitioners, and also because the Canal Zone is not an incorporated entity.

Without regard to any differences in the status of any of the petitioners, it is respectfully urged that all of the arguments advanced represent simply an effort to obtain a reversal of principles of law definitely settled by decisions of this Court and followed repeatedly by the various circuit courts. It is clear that neither of the questions raised by the petitioners can be considered in any way novel, nor have the petitioners pointed to any conflict of decisions of the various circuit courts. There is no basis for granting the writ.

II

The Pledges Are Illegal and Void

In *Texas and Pacific Ry.* v. *Pottorff*, 291 U. S. 245 and in *City of Marion* v. *Sneeden*, 291 U. S. 262, this

court held that a national bank had no power to pledge its assets to secure either a public or a private deposit, unless authorized or required to do so by an appropriate act of Congress.

In *Texas & Pacific Ry.* v. *Pottorff*, *supra*, this court said:

> "National Banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied."

Similarly in *City of Marion* v. *Sneeden*, *supra*, it was said:

> "For the reasons stated in *Texas & Pacific Ry. Co.* v. *Pottorff*, No. 128, decided this day (291 U. S. 245, *ante*, 777, 54 S. Ct. 416), we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Sec. 45 by the Secretary of the Treasury of the United States."

This rule was followed by the court below both in the instant case and in *O'Connor* v. *Rhodes*, 79 Fed. (2d) 146, which latter case as we have stated involved the same facts as to the Merchant Fleet funds as now presented and as to which *certiorari* was denied. It has also been followed by all of the circuit courts in which the question has been presented, and *certiorari* has been consistently denied by this court. See:

Leonard v. *Gage*, 94 Fed. (2d) 19, (C.C.A. 4th Cir.) cert. den. 82 L. Ed. Adv. Op. 641.
Hood v. *Hardesty*, 94 Fed. (2d) 26, (C.C.A. 4th Cir.) cert. den. 82 L. Ed. Ad. op. 748.
City of Ft. Worth v. *McCamey*, 93 Fed. (2d) 964, (C.C.A. 5th Cir.) cert. den. 82 L. Ed. Ad. Op. 1038.

City of Chicago v. *Joseph*, 95 Fed. (2d) 444 (C.C.A. 7th Cir.) cert. den. 82 L. Ed. Ad. Op. 1043.

Queenan v. *Mays*, 90 Fed. (2d) 525, (C.C.A. 10th Cir.) cert. den. 302 U. S. 734.

Nelson v. *Lewis*, 73 Fed. (2d) 521, (C.C.A. 2nd Cir.).

Buckley v. *South Western National Bank*, 88 Fed. (2d) 263, (C.C.A. 3rd Cir.).

Griffin v. *Royall*, 70 Fed. (2d) 103, (C.C.A. 4th Cir.).

Webb v. *American Surety Co. of New York*, 88 Fed. (2d) 171, (C.C.A. 5th Cir.).

Granzow v. *Village of Lyons*, 89 Fed. (2d) 83, (C.C.A. 7th Cir.).

LaPerr v. *City of Rockford*, 100 Fed. (2d) 563, (C.C.A. 7th Cir.).

Redfield Independent School District v. *Schnetzer*, 94 Fed. (2d) 257, (C.C.A. 8th Cir.).

Utter v. *Eckerson*, 78 Fed. (2d) 307, (C.C.A. 9th Cir.).

The petitioners contend, however, that the pledges were legal because: (a) made in "substantial" conformity with the provisions of Section 90 of Title 12, U. S. C.; (b) because made in accordance with an alleged long established custom and usage; and (c) because of certain acts of Congress, regulations and orders of the Canal Zone dealing with the administration of the Canal Zone. It is obvious that the third reason relates to the Canal Zone only.

The pledges were not made in substantial conformity with the provisions of Section 90, Title 12 U.S.C.

A reading of Section 90, Title 12, U. S. C. as well as what was said by the court below in the Rhodes case shows that for a pledge to have been legally made under that section, it must be shown: (a) that

the deposits were public money of the United States; (b) that the bank was a designated depository; (c) that the deposit was made by direction of the Secretary of the Treasury and subject to his check or control; and (d) that the pledge was made to the Secretary of the Treasury. The record is clear that none of these requirements were met in the instant case and in fact petitioners do not seriously contend that three of the four requirements were met. There is no dispute that the bank was not a designated depository (R. 43, 90); that the deposits were not made by the Secretary of the Treasury, but by the Fleet Corporation (R. 43), the Inland Waterways Corporation (R. 74) and the Secretary of War (R. 6), respectively, and consequently were not subject to the check or control of the Secretary of the Treasury; nor is there any question that the securities in question were exacted by the Merchant Fleet Corporation, the Inland Waterways Corporation, and the Secretary of War, and not by the Secretary of the Treasury.

In view of the fact that three of the four requirements of Section 90, have not been met, it would seem obvious that the pledges were not made in conformity with this section regardless of whether or not the deposits were of public money.

However, it is believed that the record clearly shows that none of the funds in question were public money of the United States and for this reason also it is clear that Section 90 has no application whatsoever. (See opinion of court below, R. 106 *et seq.*) As to the Canal Zone, it has never before been argued and *was not plead* that the funds involved were public money of the United States. The record clearly

shows that the funds are moneys of the Canal Zone, consequently not public money of the United States, and this was admitted in the answer. (R. 90.)

In view of these facts, it is clear that the court below was quite correct in holding that these pledges could not be considered as authorized by Section 90 of Title 12 U.S.C.

Neither custom nor usage can authorize the pledges.

The suggestion that lack of satisfactory authority may be supplied by an alleged custom and usage needs no discussion. This precise point was decided contrary to the contention of petitioners by this court in *City of Marion* v. *Sneeden, supra*, and has been followed in the decisions of various circuit courts.

City of Fort Worth v. *McCamey*, 93 Fed. (2d) 964

Leonard v. *Gage*, 94 Fed. (2d) 19

Maxwell and Porter, et al. v. *Tarrant County Water Control and Improvement District*, Nos. 650 and 645 in Equity, the District Court of the United States for the Northern District of Texas, Fort Worth Division.

No statutory authority as to pledges made to officials of the Canal Zone.

In addition to the contentions previously discussed, it is argued that circulars, regulations and acts of the Canal Zone coupled with acts of Congress relating to the government of the Canal Zone can be construed so as to authorize the plege given to secure Canal Zone deposits.

An examination of these various enactments shows that they fall far short of the necessary statutory au-

thorization required in view of the Pottorff and Sneeden decisions. The opinion of the court below contains a complete analysis of the various orders, regulations and statutes involved, and correctly holds that authority for the pledge cannot be read into these various enactments. The court below in line with the decision of this court in *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559 found a complete absence of any act of Congress specifically authorizing the taking of security in connection with Canal Zone funds.

In the *Lewis case, supra*, it was said at page 564:

> "In *Texas & P. R. Co.* v. *Pottorff*, 291 U. S. 245, *ante*, 777, 54 S. Ct. 416, and *Marion* v. *Sneeden*, 291 U. S. 262, *ante*, 787, 54 S. Ct. 421, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress."

Petitioners in their petition in case No. 628 now refer to circular Nos. 660-2 issued from the office of the Governor of the Canal Zone on April 1, 1914, which is not in the record and was not mentioned by petitioners in their brief below. Petitioners contend that the provisions of this circular, when considered with the provisions of the Congressional Act of August 21, 1916, must be considered as specific authority for the pledge.

The vice of this argument lies both in the interpretation given to the circular itself and of the Act of 1916. The circular related to contracts that had been entered into by the Secretary of War under an assumption (now by virtue of decisions of this court

declared erroneous) that National banks had the right to secure deposits such as those relating to Canal Zone funds, and is no more than a direction to officials to deposit in banks with which such contracts were had. It cannot be construed of itself to be a requirement for the taking of security. As stated, it simply recognizes an existing condition wrongfully assumed to be a warranted one and does not bring into existence any requirement, whether warrantable or not, that deposits of Canal Zone funds *must be secured*. The 1916 Act of Congress likewise does not undertake by affirmation or otherwise to require the giving of security in connection with deposit of Canal Zone funds. In point of fact, it by its terms relates only to the disposition of interest paid on account of such deposits. The contention that the circular of April 1, 1914 plus the subsequent Act of Congress, August, 1916, is such a *specific statutory requirement* for the taking of security for such deposits as to avoid the National Banking Law forbidding preferences is in our judgment without warrant.

Hence, it is clear that as to all three petitioners no authority existed for the pledge of assets and that the respondent herein is entitled, as held by the court below, to recover his property.

III

The United States Is not an Indispensable Party

The other question presented in the Petition for Certiorari is whether or not the suit is in effect a suit against the United States.

As to Inland Waterways, and Merchant Fleet Corporation.

This point was disposed of, as we have stated, as to the Merchant Fleet Corporation by the decision in

the Rhodes case which is also directly applicable to the Inland Waterways Corporation. Both the Merchant Fleet Corporation and the Inland Waterways are expressly given the power to sue and be sued, and being governmental corporations engaged in functions which are not strictly governmental but in most respects commercial, there can be no question that they are subject to suit just as a private corporation. See, *Sloan Shipyard* v. *U. S. Fleet Corporation*, 258 U. S. 549; *U. S. ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1; *Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519; *Lindgren* v. *U. S. Shipping Board Merchant Fleet Corp.*, 55 F. (2d) 117.

In *Sloan Shipyard* v. *U. S. Fleet Corporation*, 258 U. S. 549, it was said:

> "* * * The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name."

Also in *U. S. ex re. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, the court said:

> "* * * Being a private corporation, the Fleet Corporation may be sued in the State or Federal Courts like other private corporations."

In the case of *Keifer & Keifer* v. *Reconstruction Finance Corporation, et al.*, No. 364, decided February 27, 1939, this Court dealt at length with the question of Governmental corporations' immunity from suit and held that such corporations even

though not expressly given the power to sue and be sued, were subject to suit both in contract and in Tort unless Congress had expressly provided to the contrary.

As to H. H. Woodring, Secretary of War and H. A. Smith, General Purchasing Agent and Chief of the Washington Office, Panama Canal.

In determining respondent's right to recover his property which is held unlawfully by Government officials, the distinction between the deposits made in the bank and the proceeds of the illegally pledged bonds must be kept in mind. It is, of course, clear that the pledge being illegal *the bonds were never the property of the pledgees or of the United States* but remained always the property of the bank and consequently the recovery of the bank's property can in no way affect the United States which has no right to said property, and *at no time has had possession of the pledged bonds or their proceeds.* Because of the foregoing, it is submitted that the cases cited by petitioners on page 10 of their petition in case No. 628 are not in point.

Inasmuch as this action is brought to recover assets of the bank, and therefore does not relate to the character of the deposits made by the officials of the Panama Canal, the United States is not a necessary party to this action for the recovery of the insolvent bank's illegally pledged assets or their proceeds.[1] This

[1] Even if there were any warrant for disregarding the fact that the suit is one for the recovery of property of the bank, the fact that the United States may ultimately have to bear a loss suffered by the petitioners as to their deposits cannot be considered as making it a necessary party. In the Sloan case, *supra*, this Court, notwithstanding the elaborate argument of counsel for the Fleet Corporation that any loss suffered by the Fleet Corporation would have to be borne by the United States, held that the suit could be maintained and the United States was not a necessary party.

conclusion is predicated upon a careful consideration and analysis of this question by the Supreme Court of the United States in *Tindal* v. *Wesley*, 167 U. S. 204; *United States* v. *Lee*, 106 U. S. 196; *Osborne* v. *Bank*, 9 Wheaton 738, and other cases of similar import determined by the Supreme Court.

In *Tindal* v. *Wesley*, 167 U. S. 204, 221, the court said:

> "We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this Court in *United States* v. *Peters*, 5 Cranch, 155, 139: 'It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the Government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the State, nor one in which the plaintiff seeks to compel the specific performance by the State of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the State."

In *United States* v. *Lee*, 106 U. S. 196, the court, in holding that a plea of sovereign immunity on behalf of the United States was not well taken, and that the United States was not an indispensable party, said:

> "This examination of the cases in this Court establishes clearly this result: that the proposi-

tion that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion, that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson*, *Brown* v. *Huger*, and *Grissar* v. *McDowell*, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

Nor is there anything in the decision of *Cummings* v. *Hardee*, decided by the U. S. Court of Appeals for the District of Columbia on January 23, 1939 in any way in conflict with this doctrine, since in that case the court found that the proceeds of the illegally pledged bonds had come into the possession of the United States by being covered into the Treasury and were subject to the constitutional provision that money covered into the Treasury cannot be withdrawn without an Act of Congress. Since the Court held that there was no statute authorizing the payment out of the proceeds of the bonds, the fact that they were covered into the Treasury made recovery by the Receiver impossible. It will be noted that the court very carefully distinguishes that case from

the instant case as well as from the Rhodes case, and pointed out that where the property was unlawfully in the hands of a Government official and subject to his control, it could be recovered.

Form of Decree

Petitioners urge in their argument in No. 628 that the form of the decree entered by the court below was erroneous since it was in substance merely a money judgment rather than in the form of a decree for restitution of the proceeds of the bonds. The form of the decree resulted from the circumstances that the bonds had been sold, that the sales were numerous, and adjustments were required by way of credit to petitioners (defendants there) for dividends as of the date of the payment thereof and in consequence computations were made accordingly. Hence the decree was entered with "no objection to the form" on the part of petitioners (defendants) (R. p. 101). The decree could have directed restitution of the bond proceeds less dividend credits. The money judgment simply represents the equivalent of the net liability of the petitioners to account to respondent as prayed in the bill.

CONCLUSION

There being no novel question involved in this case and the decision of the lower court being in strict accord with applicable decisions of this Court, it is submitted that the petition on behalf of Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Harry H. Woodring, Secretary of War, and H. A. A. Smith, General Purchasing Officer and Chief of Washing-

ton Office of Panama Canal, for a writ of certiorari to the United States Court of Appeals for the District of Columbia, be denied.

Respectfully submitted,

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February, 1939.